Lee Kim Noor & Anor v Julian Chong Sook Keong & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-1352–07 OF 2019
MOHAMAD ZABIDIN, NANTHA BALAN AND LEE HENG CHEONG JJCA
21 JULY 2021

Civil Procedure — Appeal — Appeal against decision of High Court — Cause of action in tort of professional negligence — Whether trial judge had erred in law and in fact in failing to consider the issue of limitation — Whether claim time barred — Limitation Act 1953 s 6

Tort — Negligence — Cause of action — Alleged negligence in preparation of sale and purchase agreement — Whether time started to run from date cause of action accrued or when damage discovered — Whether cause of action accrued when sale and purchase agreement executed or when full purchase price paid — Whether claim time barred — Limitation Act 1953 s 6

This was an appeal by the appellants against the Penang High Court's decision dated 25 June 2019 which allowed the respondents claim and ordered that the appellants pay the respondents, the sum of RM1.5m with an interest rate of 5%pa on the sum of RM1.5m calculated from 27 May 2015 until full settlement; and cost of RM100,000. The respondents filed a legal action on 28 July 2015 against the appellants for professional negligence and negligent misstatement. On 25 June 2019, the learned High Court judge allowed the respondents' claim. The appellants then filed the present appeal. The respondents executed a sales and purchase agreement dated 22 April 2004 ('SPA'), to purchase a piece of land described as Plot 32 at Krystal Garden ('the said property') from Reka Mesra Sdn Bhd ('the developer') and also a construction agreement bearing the same date, for the construction of a house on the said property. There was no dispute or issue with the construction agreement. The SPA was printed by the developer, executed by the respondents on 6 April 2004 and forwarded to the appellants for stamping on 22 April 2004. At that material time, the appellants did not conduct a land search of the said property and the SPA did not state that the said property was charged to any bank as the column for 'name of bank/financier' in the SPA was left blank. The respondents paid the final purchase price of the said property to the developer on 26 May 2004. On 2 September 2014, the respondents received a letter from Bank Islam Bhd, who was the chargee of the said property, demanding the respondents to pay the redemption sum of RM900,000 in order to redeem the said property. Hence, the respondents initiated the present

action against the appellants. The learned High Court judge, inter alia, held that the appellants owed a duty of care to the respondents, as their solicitors and that the appellants were negligent, based on the conduct of parties in the transaction. The learned High Court judge also identified three main breaches of duty of care by the appellants which were as follows, firstly, in the preparation of the SPA, secondly, in the failure to conduct a land search and thirdly, in the deliberate cover up of negligence for many years. The learned High Court judge granted judgment in favour of the respondents and ordered the appellants to pay damages to the respondents. The appellants contended that the learned High Court judge had erred in law and in fact in allowing the respondents' claim: (a) in completely failing to consider and address the appellants' defence that the respondents' claim was time barred by s 6 of the Limitation Act 1953; (b) in failing to determine that the appellants were actually acting as the developer's solicitor instead of the respondents' solicitor and therefore, the appellants owed no duty of care to the respondents; (c) in failing to consider the three-fold test provided in the Federal Court case of *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553 when deciding whether the appellants owed a duty of care to the respondents since the appellants were not the respondents' solicitor; (d) in failing to determine that there was no breach of duty of care by the appellants; and (e) in granting the quantum of damages to the respondents and also in failing to determine that the respondents had not suffered any actual loss.

Held, allowing the appeal with costs:

(1) One of the appellants' main defence and contentions relates to s 6 of the Limitation Act 1953. The learned justices were in agreement with the appellants' contention that the learned High Court judge had failed to address this issue raised by the appellants in her grounds of judgment, notwithstanding that the issue of limitation was profoundly submitted by both the appellants and the respondents (see para 22).

(2) The learned justices were of the considered opinion that a cause of action in tort arises when the plaintiffs suffered damage. Section 6(1)(a) of the Limitation Act 1953 was a mandatory provision which must be strictly observed. The learned justices were also of the considered opinion that in the context of the factual matrix of the present suit, the six years as stated in s 6 of the Limitation Act 1953 started to run from the date the cause of action accrued and not when the respondents discovered the damage (see paras 33 & 35–36).

(3) The learned justices were of the considered opinion that the alleged negligence of the appellants would have occurred when the respondents executed the SPA on either 6 April 2004 or 22 April 2004 as at that particular point of time, the column of bank/financier was left blank by

the appellants and thus the appellants were in breach of their duty as the solicitors for the respondents. The period of limitation could be said to have begun to run only from the first clear and unequivocal threat to the respondents' right to purchase the said property, free from all liens and encumbrances, arising from the appellants' breach of their duty of care, to conduct a land search on the said property and to ensure that the column of bank/financier in the SPA was filled in. Thus, the respondents would have suffered damage, the moment the SPA was executed as the respondents would have contracted to purchase a property which was encumbered with a charge and which charge was not reflected in the SPA, thereby placing the respondents in a position of detriment. Hence, the respondents' cause of action in the present case arose on the date when the respondents executed the SPA which was either on 6 April 2004 or 22 April 2004 (see paras 41–42).

(4) Since the respondents' cause of action for the tort of professional negligence against the appellants arose on either 6 April 2004 or 22 April 2004, the respondents must have brough a claim in tort against the appellants, before the year 2010 which was within six years from the date of the cause of action. However, in the present case, the respondents had only filed the suit in 2015 which was 11 years from the date when the cause of action accrued. The court also found that even if the respondents' cause of action for tort did not arise on the date when the respondents executed the SPA, the cause of action for the tort of professional negligence would have accrued on the date when the respondents paid the full purchase price for the said property, which was on 26 May 2004 as the respondents would have suffered damage by virtue of being owners of a property which was encumbered with a charge, thereby placing the respondents in a position of detriment. Either way, the learned justices were of the considered opinion that the respondents' claim under tort was time barred as the suit was only filed on 28 July 2015 (see paras 43–45).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi Pulau Pinang bertarikh 25 Jun 2019 yang membenarkan tuntutan responden dan memerintahkan perayu membayar responden, jumlah RM1.5 juta dengan kadar faedah 5% setahun ke atas jumlah RM1.5 juta dikira mulai 27 Mei 2015 sehingga penyelesaian penuh; dan kos RM100,000. Responden memfailkan tindakan undang-undang pada 28 Julai 2015 terhadap perayu atas kecuaian profesional dan salah nyata cuai. Pada 25 Jun 2019, hakim Mahkamah Tinggi yang bijaksana telah membenarkan tuntutan responden. Perayu-perayu kemudian memfailkan rayuan semasa. Responden telah memasukki perjanjian jual beli bertarikh 22 April 2004 ('SPA'), untuk membeli sekeping tanah berketerangan Plot 32 di Krystal Garden ('hartanah tersebut') daripada Reka

Mesra Sdn Bhd ('pemaju') dan juga perjanjian pembinaan yang mengandungi tarikh yang sama, untuk pembinaan rumah di atas hartanah tersebut. Tiada pertikaian atau isu dengan perjanjian pembinaan. SPA telah dicetak oleh pemaju, ditandatangani oleh responden pada 6 April 2004 dan dimajukan kepada perayu untuk disetem pada 22 April 2004. Pada masa material, perayu tidak menjalankan carian tanah ke atas hartanah tersebut dan SPA tidak dinyatakan bahawa hartanah tersebut telah digadai kepada mana-mana bank kerana ruangan 'nama bank/pembiaya' di SPA telah dibiarkan kosong. Responden telah membayar harga belian akhir hartanah tersebut kepada pemaju pada 26 Mei 2004. Pada 2 September 2014, responden menerima surat daripada Bank Islam Bhd, yang merupakan pemegang gadaian hartanah tersebut, menuntut responden membayar jumlah penebusan sebanyak RM900,000 untuk menebus hartanah tersebut. Oleh itu, responden memulakan tindakan semasa terhadap perayu. Hakim Mahkamah Tinggi yang bijaksana, antara lain, memutuskan bahawa perayu-perayu mempunyai tugas berhati-hati kepada responden, sebagai peguamcara mereka dan bahawa perayu-perayu cuai, berdasarkan tindakan pihak-pihak dalam transaksi tersebut. Hakim Mahkamah Tinggi yang arif bijaksana juga mengenal pasti tiga pelanggaran utama tugas berhati-hati oleh perayu-perayu iaitu seperti berikut, pertama, dalam penyediaan SPA, kedua, dalam kegagalan untuk menjalankan carian tanah dan ketiga, dalam menyembunyikan kecuaian secara sengaja selama bertahun-tahun. Hakim Mahkamah Tinggi yang bijaksana memberikan penghakiman yang memihak kepada responden dan memerintahkan perayu membayar ganti rugi kepada responden. Perayu-perayu berhujah bahawa hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam membenarkan tuntutan responden: (a) dengan gagal sama sekali mempertimbangkan dan mengambilkira pembelaan perayu bahawa tuntutan responden telah dihalang oleh had masa berdasarkan s 6 Akta Had Masa 1953; (b) kerana gagal untuk menentukan bahawa perayu-perayu sebenarnya bertindak sebagai peguamcara pemaju dan bukannya peguam cara responden dan oleh itu, perayu-perayu tidak mempunyai tugas berhati-hati kepada responden; (c) kerana gagal mempertimbangkan ujian 'three-fold' yang diperuntukkan dalam kes Mahkamah Persekutuan *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553 apabila memutuskan sama ada perayu mempunyai tugas berhati-hati kepada responden memandangkan perayu bukan peguamcara responden; (d) apabila gagal untuk menentukan bahawa tiada pelanggaran tugas berhati-hati oleh perayu; dan (e) dalam memberikan kuantum ganti rugi kepada responden dan juga dalam kegagalan untuk menentukan bahawa responden tidak mengalami apa-apa kerugian sebenar.

Diputuskan, membenarkan rayuan dengan kos:

(1) Salah satu pembelaan dan penghujahan utama perayu adalah berkaitan

dengan s 6 Akta Had Masa 1953. Hakim-hakim yang bijaksana bersetuju dengan hujahan perayu bahawa hakim Mahkamah Tinggi yang bijaksana telah gagal menangani isu yang dibangkitkan oleh perayu-perayu dalam alasan penghakiman beliau, walaupun isu had masa telah dikemukakan secara mendalam oleh kedua-dua perayu dan responden (lihat perenggan 22).

(2) Hakim-hakim yang bijaksana berpendapat bahawa kausa tindakan dalam tort timbul apabila plaintif mengalami kerugian. Seksyen 6(1)(a) Akta Had Masa 1953 adalah peruntukan mandatori yang mesti dipatuhi dengan ketat. Hakim-hakim yang bijaksana juga berpendapat bahawa dalam konteks matriks fakta tindakana semasa, enam tahun seperti yang dinyatakan dalam s 6 Akta Had Masa 1953 mula berjalan dari tarikh kausa tindakan terakru dan bukannya apabila responden mendapati terdapat kerugian (lihat perenggan 33 & 35–36).

(3) Hakim yang bijaksana berpendapat bahawa dakwaan kecuaian perayu hanya akan berlaku apabila responden menandatangani SPA sama ada pada 6 April 2004 atau 22 April 2004 pada masa tersebut, ruangan bank/pembiaya telah dibiarkan kosong oleh perayu dan dengan itu perayu telah melanggar kewajipan mereka sebagai peguamcara untuk responden. Tempoh had boleh dikatakan telah mula berjalan hanya dari ancaman pertama yang jelas dan nyata kepada hak responden untuk membeli hartanah tersebut, bebas daripada semua lien dan bebanan, yang timbul daripada pelanggaran tugas berhati-hati mereka, untuk menjalankan carian tanah ke atas hartanah tersebut dan untuk memastikan ruangan bank/pembiaya di SPA diisi. Oleh itu, responden hanya akan mengalami kerugian, pada saat SPA ditandatangani kerana responden akan memasuki kontrak untuk membeli hartanah yang dibebani dengan gadaian yang mana gadaian yang tidak dinyatakan dalam SPA, sekali gus meletakkan responden dalam kedudukan yang merugikan. Oleh itu, kausa tindakan responden dalam kes ini timbul pada tarikh responden menandatangani SPA iaitu sama ada pada 6 April 2004 atau 22 April 2004 (lihat perenggan 41–42).

(4) Memandangkan kausa tindakan responden untuk tort kecuaian profesional terhadap perayu timbul sama ada pada 6 April 2004 atau 22 April 2004, responden mestilah telah mengemukakan tuntutan tort terhadap perayu, sebelum tahun 2010 iaitu dalam tempoh enam tahun dari tarikh punca tindakan. Bagaimanapun, dalam kes semasa, responden hanya memfailkan saman pada 2015 iaitu 11 tahun dari tarikh kausa tindakan terakru. Mahkamah juga mendapati walaupun kausa tindakan responden untuk tort tidak timbul pada tarikh responden menandatangani SPA, kausa tindakan untuk tort kecuaian profesional akan terakru pada tarikh responden membuat pembayaran penuh harga belian bagi hartanah tersebut, iaitu pada 26 Mei 2004 kerana responden

akan mengalami kerugian kerana menjadi pemilik hartanah yang dibebani dengan gadaian, sekali gus meletakkan responden dalam kedudukan yang merugikan. Bagaimanapun, hakim yang bijaksana berpendapat bahawa tuntutan responden di bawah tort dihadkan oleh masa kerana tuntutan tersebut hanya difailkan pada 28 Julai 2015 (lihat perenggan 43–45).]

Cases referred to

AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784, CA (folld)
Bell v Peter Browne & Co (a firm) [1990] 3 All ER 124, CA (refd)
First National Commercial Bank PLC v Humberts (a firm) [1995] 2 All ER 673, CA (refd)
Forster v Outred & Co (a firm) [1982] 2 All ER 753, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid [1998] 1 MLJ 615; [1997] 4 CLJ SUPP 320, HC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Malsa Ideal Sdn Bhd v Jayasuriya Kah & Co [2012] 1 LNS 934, CA (refd)
Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577; [2010] 6 CLJ 857, FC (refd)
Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors [2010] 9 MLJ 603, HC (refd)
Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor [2020] 4 MLJ 380; [2020] 5 CLJ 82, CA (refd)
Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553, FC (refd)
Tunku Dato' Sri Iskandar Tunku Abdullah v Ahmad Kamil Abdullah & Ors [2009] 6 CLJ 359 (refd)
Vista Specialist Eye Center Sdn Bhd v Dato' Loo Son Yong and another appeal [2016] 5 MLJ 832; [2016] 1 LNS 1127, CA (refd)

Legislation referred to

Limitation Act 1953 ss 6, 6(1), (1)(a), 29
Limitation Act 1939 [UK]
Limitation Act 1980 [UK]

Appeal from: Civil Case No PA-22NCVC-166–08 of 2016 (High Court, Penang)

Murelidaran Navaratnam (Felix Lim and Vijaya Navaratnam with him) (Mureli Navaratnam) for the appellants.
Ong Yu Shin (Marcia Geraldine Lopez and Ooi Keng Liang with him) (Shariffah, Ooi & Co) for the respondents.

Lee Heng Cheong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants/defendants against the Penang High Court's decision dated 25 June 2019 which allowed the plaintiffs/respondents' claim and ordered that the appellants/defendants pay the respondents/plaintiffs, the sum of RM1.5m with an interest rate of 5%pa on the sum of RM1.5m calculated from 27 May 2015 until full settlement; and cost of RM100,000.

[2] The respondents/plaintiffs filed a legal action on 28 July 2015 against the appellants/defendants for professional negligence and negligent misstatement. On 25 June 2019 the learned High Court judge allowed the respondents/plaintiffs' claim. The appellants/defendants then filed the present appeal.

[3] For ease of reference, the parties herein will be referred to as they were in the proceedings before the High Court.

[4] We heard the appeal and after due deliberation and having carefully considered the submissions of both parties, we found that there are merits in the appeal and unanimously allowed the appeal with costs. This judgment explains why we allowed the appeal.

THE SALIENT FACTS

[5] The plaintiffs executed a sales and purchase agreement dated 22 April 2004 ('SPA'), to purchase a piece of land described as Plot 32 at Krystal Garden ('the said property') from Reka Mesra Sdn Bhd ('the developer') and also a construction agreement bearing the same date, for the construction of building a house on the said property. There is no dispute or issue with the construction agreement. What is in dispute before us, is the SPA.

[6] The SPA was printed by the developer, executed by the plaintiffs on 6 April 2004 and forwarded to the defendants for stamping on 22 April 2004. At that material time, the defendants did not conduct a land search of the said property and the SPA did not state that the said property was charged to any bank as the column for 'name of bank/financier' in the SPA was left blank.

[7] The plaintiffs paid the final purchase price of the said property to the developer on 26 May 2004.

[8] On 2 September 2014, the plaintiffs received a letter from Bank Islam Bhd, who is the chargee of the said property, demanding the plaintiffs to pay the redemption sum of RM900,000 in order to redeem the said property.

[9] Hence the plaintiffs initiated the present action against the defendants.

FINDINGS OF THE HIGH COURT

[10] The learned High Court judge, inter alia, held that the defendants owed a duty of care to the plaintiffs, as their solicitors and that the defendants were negligent, based on the conduct of parties in the transaction. The learned High Court judge also identified three main breaches of duty of care by the defendants which are as follows, firstly, in the preparation of the SPA, secondly, in the failure to conduct a land search and thirdly, in the deliberate cover up of negligence for many years.

[11] The learned High Court judge granted judgment in favour of the plaintiffs and ordered the defendants to pay damages to the plaintiffs

THE DEFENDANT'S CONTENTIONS BEFORE THIS COURT

[12] The defendants contended that the learned High Court judge had erred in law and in fact in allowing the plaintiffs' claim based on the following:

(a) the learned High Court judge had erred in law and in fact in completely failing to consider and address the defendants' defence that the plaintiffs' claim is time barred by s 6 of the Limitation Act 1953;

(b) the learned High Court judge had erred in law and in fact in failing to determine that the defendants were actually acting as the developer's solicitor instead of the plaintiffs' solicitor and therefore, the defendants owe no duty of care to the plaintiffs;

(c) the learned High Court judge had erred in law and in fact in failing to consider the three fold test provided in the Federal Court case of *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553 when deciding whether the defendants owe a duty of care to the plaintiffs since the defendants were not the plaintiffs' solicitor;

(d) the learned High Court judge had erred in law and in fact, in failing to determine that there is no breach of duty of care by the defendants; and

(e) the learned High Court judge had erred in law and in fact in granting the quantum of damages to the plaintiffs, in the sum of RM1.5m with an interest rate of 5%pa calculated from 27 May 2015 until full settlement

and cost of RM100,000 and also failed to determine that the plaintiffs had not suffered any actual loss, when there were no evidence to support the same.

THE PLAINTIFF'S CONTENTIONS BEFORE THIS COURT

[13] The plaintiffs in turn, contended as follows:

(a) that the defendants left the specific section provided for the details of 'name of bank/financier' in the SPA schedule for chargee, blank;

(b) the particulars of charge in the SPA are an essential part of the SPA which the defendants omitted to state. The importance of the particulars of the dharge is *ipso facto* highlighted in para 1.2.9 of the First and Second Schedules of the SPA itself where it states 'The First and Second Schedules hereto shall form part of this agreement and shall be taken to read and construed as an essential part of this agreement'; and

(c) at the material time, the developer had in fact charged the property to Bank Islam Bhd on 15 April 2004, months before the signing of the SPA. The defendants' failure to state the correct or any particulars of the chargee is negligent misstatement which is the first alleged act of negligence of the defendants.

[14] The plaintiffs also contended that the defendants admitted that it could not prove that a land search of the said property with the land registry was conducted prior to the preparation of the SPA. This failure to do a simple land search is the second alleged act of negligence of the defendants.

[15] The plaintiffs contended that from year 2009 until 2012, the defendants communicated with the plaintiffs and made all attempts to cover up that there was an error in the SPA. In 2012, the defendants even tried to pacify the plaintiffs by stating that the fact that the said property, being charged to Bank Islam Bhd, 'could be incorrect'. Instead of owning up and rectifying the problem, the defendants tried to shift the blame, even to the extent of alleging fraud or an 'inside job' against Bank Islam Bhd.

[16] When the defendants found out about their error in the SPA in 2010, it was still not too late to rectify the problem as the developer was still in existence and solvent then. The defendants could have obtained a simple discharge letter from the developer, discharging the said property from Bank Islam Bhd. Unfortunately, the defendants only verbally discussed this with the developer. Eventually, the developer was wound up on 15 June 2011. If the defendants

have rectified the problem in 2009 and 2010, the plaintiffs could have still saved the said property. This cover up is the third alleged act of negligence of the defendants.

[17] The plaintiffs contended that their claim for negligence is not time barred as, there were several instances of negligence committed by the defendants, as found by the High Court, stretching from 2004 until 2012.

THE LAW

[18] It is trite law that the specific finding of facts by the learned High Court judge as a trier of facts should not be disturbed by an appellate court such as this court herein unless that finding was plainly wrong: see *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; [2010] 6 CLJ 857 (FC) paras 41–48.

[19] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision.*But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence*. (Emphasis added.)

[20] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[21] Bearing in mind, the above principles distilled from the above authorities, we will now consider the defendants' appeal.

FINDINGS OF THIS COURT

[22] One of the defendants' main defence and contentions before us and the learned High Court judge relates to s 6 of the Limitation Act 1953. We are in agreement with the defendants' contention that the learned High Court judge had failed to address this issue raised by the appellants, in her grounds of judgment notwithstanding that the issue of limitation was profoundly submitted by both the defendants and the plaintiffs.

[23] Having read and considered the written and oral submissions of learned counsels for the defendants and the plaintiffs, we find that the only issue which merits our consideration is whether the plaintiffs' claim against the defendants is time barred, which the learned High Court judge has failed or omitted to consider at all.

[24] It is the defendants' pleaded defence that the plaintiffs' claim is time-barred by virtue of the statutory provisions of s 6(1) of the Limitation Act 1953 which provides that:

> 6 Limitation of actions of contract and tort and certain other Actions
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) *Actions founded on a contract or on tort*; (Emphasis added.)

[25] The plaintiffs contended that the defendants were negligent in preparing the SPA, by failing to state that the said property is encumbered with an existing charge and in the manner the defendants handled the problem after the discovery of the problem. The plaintiffs were led to assume that the said property was unencumbered and suffered loss when years later, Bank Islam Bhd, the chargee of the charge, came to foreclose the said property after the developer/chargor was wound up.

[26] As stated earlier, it is the contention of the plaintiffs that their claim for negligence is not time barred as, there were several instances of negligence committed by the defendants, as found by the High Court, stretching from 2004 until 2012. Further, the plaintiffs submitted that they only suffered actual loss in year 2013/2014 when Bank Islam Bhd issued the formal foreclosure notice and demanded for a redemption sum of RM900,000 for the said property in 2014.

[27] The plaintiffs argued that a cause of action based on negligence accrues only when damage is suffered as laid down in *Tunku Dato' Sri Iskandar Tunku Abdullah v Ahmad Kamil Abdullah & Ors* [2009] 6 CLJ 359 and *Malsa Ideal Sdn Bhd v Jayasuriya Kah & Co* [2012] 1 LNS 934.

[28] The plaintiffs took the position that when the SPA was prepared negligently by the defendants in 2004, the plaintiffs did not suffer actual loss upon their execution of the same. The plaintiffs only suffered damage and actual loss, arising from the defendant's negligence, when Bank Islam Bhd, through its solicitors, issued a notice to foreclose via a letter dated 14 November 2013 and/or when Bank Islam Bhd issued a formal foreclosure notice to the plaintiffs to redeem property, requiring them to pay the sum of RM900,000

vide notice dated 2 September 2014. Since their present suit was filed on 28 July 2015, it is well within the limitation period of six years from their actual loss and damage vide the foreclosure notice.

[29] The plaintiffs also contended that if they filed a suit for negligence for damages against the defendants before Bank Islam Bhd commenced foreclosure proceedings or exercised its' rights as a chargee, then such a claim may fail as it will be a claim for damages for prospective or potential loss and not actual loss. The plaintiffs relied on the decision of this court in *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380; [2020] 5 CLJ 82 , where it was held '... In negligence actions, since damage is an essential part of the cause of action, the period of limitation runs from the date of the damage and not of the act which caused the damage ...'.

[30] The plaintiffs also relied on the High Court case of *Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid* [1998] 1 MLJ 615; [1997] 4 CLJ SUPP 320 which followed and cited with approval, the English authorities of *First National Commercial Bank PLC v Humberts (a firm)* [1995] 2 All ER 673 and *Bell v Peter Browne & Co (a firm)* [1990] 3 All ER 124 which held:

> ... actionable actual loss (as opposed to a mere potential for loss) occurred only when the insured was called on by a third party to make payments against which it would have been entitled to be indemnified by the insurer under the contract as represented ...
>
> When the events entitling the third party to make the demand for payment occurred and when the insurer indicated, prior to the making of that demand, that it would not indemnify the insured against any such demand, there was no more than a potential for loss ...

[31] In the light of the conflicting stands taken by the parties herein, it would be necessary to determine when the causes of actions for the plaintiffs' case accrued

ACCRUAL OF CAUSE OF ACTION IN TORT

[32] In the present case, the basis of the plaintiffs' claim against the defendants relates to the defendants' negligence in leaving the column of bank/financier in the SPA, blank and in failing to conduct a land search of the said property. Thus, the plaintiffs' case which is grounded on the tort of negligence here is one that revolves on the defendants' purported negligence in the preparation of the SPA which was executed on 6 April 2004.

[33] We are of the considered opinion that a cause of action in tort arises when the plaintiffs suffered damage. The issue of when the cause of action for a tort arises, was dealt with, in *AmBank (M) Bhd v Abdul Aziz bin Hassan &*

Ors [2010] 3 MLJ 784 where the Court of Appeal held that:

> [34] It is trite law that a *cause of action founded in tort accrues when the appellant suffers damage* (*Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid*).
>
> [35] According to the case of *Forster v Outred & Co (a firm)* [1982] 1 WLR 86 (CA), *it was necessary to prove actual damage in order to constitute a cause of action in negligence and that on the pleaded facts the plaintiff had suffered actual damage through the defendant's negligence by executing a mortgage deed whereby her property was encumbered with a legal charge and she was subjected to a liability which might mature into a financial loss; and that, therefore, her cause of action accrued in February 1973 notwithstanding that she did not actually become liable for the repayment of the Joan until the demand was made* and, accordingly, the second writ was issued outside the six years' limitation period and the action begun by the first writ was rightly dismissed. (Emphasis added.)

[34] Further, reference and support can be found in the English case of *Forster v Outred & Co (a firm)* [1982] 2 All ER 753 where the English Court of Appeal deliberated and found as follows:

> The cause of action in negligence requires not only carelessness by the defendant but also for damage to have been suffered by the plaintiff So the question in this case is; when did the plaintiff suffer damage?
>
> ...
>
> Under the express terms of the mortgage the plaintiff was under no liability to the mortgagees for repayment of her son's overdraft and the mortgagees could not exercise their power of sale of the mortgaged property until demand has been made under the mortgage. But does that mean no damage was suffered by the plaintiff until there had been a demand (as was submitted by the counsel for the plaintiff)? (Emphasis added.)
>
> *I approach this case on the basis that it is sufficient that it is financial loss that should be foreseen, and I would hold that in cases of financial or economic loss the damage crystallises and the cause of action is complete at the date when the plaintiff, in reliance on negligent advice, acts to his detriment*.
>
> In *Sykes and Others v Midland Bank Executor & Trustee Co Ltd and Others* [1969] 2 All ER 1238; [1969] 2 QB 518; on appeal [1970] 2 All ER 471; [1971] 1 QB 113 *the damage crystallised when the plaintiff in reliance on the negligent advice, executed the lease. It may be that at that time the plaintiff had not paid any money, but it is sufficient if he has suffered some loss capable of quantification in terms of money*: *see Simple Simon Catering Ltd v Binstock Miller & Co* (1973) 228 EG 527 ...
>
> *In this case, as soon as she executed the mortgage the plaintiff not only became liable under its express terms but also, and more importantly, the value of the equity of redemption of her property was reduced. Before she executed the mortgage deed she owned the property free from incumbrance; thereafter she became the owner of a property subject to a mortgage*. That, in my view, *was quantifiable loss and as from that date her cause of action against her solicitor was complete, because at that date she had suffered damage.* The actual quantum of damages would, of course, depend on events between that date and the date when the damages had finally to be assessed, *but the cause of action*

was complete when she executed the mortgage, without proof of special damage. I would therefore hold that the cause of action accrued on 8 February 1973 and the time had expired by the date of the issue of the second writ For these reasons and for the reasons given by Stephenson LJ, too, would dismiss the appeal. (Emphasis added.)

[35] Section 6(1)(a) of the Limitation Act 1953 is mandatory provision which must be strictly observed. This is laid down in the case of *Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors* [2010] 9 MLJ 603 at p 603 where the High Court held as follows:

The *period of limitation as contained in s 6(1)(a) of the Act is mandatory and must be strictly observed* unless there are sufficient facts to bring it within the exception as provided under s 29(b) of the Act, which is not the case in the present case. (Emphasis added.)

[36] We are also of the considered opinion that in the context of the factual matrix of the present suit, the six years as stated in s 6 of the Limitation Act 1953 starts to run from the date, the cause of action accrues and not when the plaintiffs discovered the damage. We find support in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors*, where Abdul Malik Ishak JCA held:

So the position, in Malaysia, remains the same and that would be that *limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage* (Emphasis added.)

[37] Further, Abdul Malik Ishak JCA in the same case, compared our Limitation Act 1953 with the UK Limitation Act 1939. This is what he said:

[20] At this juncture, it is ideal to see how s 2(1)(a) of the UK Limitation Act 1939 is worded. We will now reproduce that section verbatim:

2(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

(a) actions founded on simple contract or on tort;

[21] *It is certainly similar to our s 6(1)(a) of the Limitation Act 1953. Now, s 2(1)(a) of the UK Limitation Act 1939, as reproduced above, merely provides that actions founded on simple contract or tort shall not be brought after the expiration of six years 'from the date on which the cause of action accrued'. The English cases have interpreted this to mean that time began to run whether or not damage was discovered.*

[22] *Since the damage is not apparent at the time the cause of action accrues, the result would certainly be harsh. This is best illustrated by the House of Lords case of Cartledge (Widow And Administratrix of the Estate of Fred Hector Cartledge (deceased)) And Others v E Jopling & Sons, Ltd* [1963] 1 All ER 341. In *Cartledge*, there were seven claims brought by steel dressers formerly employed by the defendant. The plaintiffs alleged that in the course of their employment, they were wrongly exposed to dust for periods from 1939 to 1950 and this exposure caused them to contract

pneumoconiosis, a disease which slowly accrued and progressively damaged their lungs without their knowledge. According to the evidence that was led, a man susceptible to pneumoconiosis who inhaled noxious dust over a period of years would have suffered substantial injury before the injury can be discovered. The House of Lords held that the cause of action was time-barred because on the true construction of s 2(1)(a) of the UK Limitation Act 1939, time did not run from the date when the plaintiffs knew or ought to have known that they were suffering from pneumoconiosis, but from the date when the cause of action accrued. On the facts of the case, the cause of action accrued before October 1950 when the plaintiffs suffered damage as a result of inhaling the dust although they were ignorant of the damage. *The House of Lords in their judgment recognised the harshness of s 2(1)(a) of the UK Limitation Act 1939 when Lord Reid held at p 343 of the report that:*

> *It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer; and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided.*

...

[23] *Briefly, Cartledge lays down the principle that limitation period runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage.*

[24] ... *Section 11 of the UK Limitation Act 1980 provides for a special time limit of three years in personal injury cases. Under this provision, the time period runs from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured. This new provision overcomes the harshness of Cartledge in the context of personal injury cases. For ease of reference, we will now produce s 11 of the the UK Limitation Act 1980:*

...

[25] ... *The House of Lords held that the action was time-barred. Lord Fraser of Tullybelton said at p 72 of the report:*

> *I am respectfully in agreement with Lord Reid's view expressed in Cartledge v Jopling that such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it.*

[26] ...

[27] The English Parliament took heed and changed the law after the decision in *Pirelli*. And the UK Latent Damage Act 1986 was enacted to remedy the harshness ...

A ...

[28] *Limitation, under s 14A of the UK Limitation Act 1980, only begins to run either six years from the date on which the cause of action accrues or three years from the 'starting date', if the three years period expires later. 'Starting date' is defined in s 14A(5) of the UK Limitation Act 1980 to mean the 'earliest date on which the plaintiff or any* B *person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action'. It is now crystal clear that s 14A(5) of the UK Limitation Act 1980 caters for negligent actions where the facts relevant to the cause of action are not known on the date of accrual of the cause of action. Limitation only runs from the date* C *the plaintiff has knowledge of the facts relevant to the cause of action. However, there is no similar or equivalent amendment to our Limitation Act 1953. So the position, in Malaysia, remains the same and that would be that limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage.* (Emphasis added.)

D

[38] We take note of the aforesaid portion of the judgment of Abdul Malik Ishak JCA, and agree with what he said in para [28] of his grounds of judgment in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors,* when he held that since there was no similar or equivalent amendment to our Limitation Act 1953 as in E the UK Limitation Act 1980, 'the position, in Malaysia, remains the same and that would be that limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage'.

[39] Furthermore, in *Vista Specialist Eye Center Sdn Bhd v Dato' Loo Son Yong* F *and another appeal* [2016] 5 MLJ 832; [2016] 1 LNS 1127, Rohana Yusuf, JCA (as she then was), referred to *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* and adopted the decision of the case. This is what she held:

[8] ... In our view the above provision is clear that the computation of six years limitation must run from the date the cause of action arose and not from the date G the alleged negligence was so discovered. If any further authority is required to explain the clear provision of the law we would refer to the decision of this court in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 663. *In interpreting s 6(1) it was held in that case that the cause of action by the Bank accrued and began to run from the alleged date of breach and not on the date such breach* H *was discovered.* The court further held in *Ambank (M) Bhd* that even though s 29 allows postponement of the limitation period until discovery of the cause of action, it only applies in cases where the cause of action is based upon fraud or a mistake or is concealed by fraud. *The court in fact referred and adopted the decision of the House of Lords in Cartledge v Joping* [1963] 2 WLR 210 *in interpreting s 2(1)(a) of the UK* I *Limitation Act 1939. The section contains similar provision to that of s 6(1) of the Limitation Act. Cartledge laid down the principle that limitation period runs from the date on which the cause of action accrues regardless of discovery of damage. This position in United Kingdom had however changed as a result of the passing of the Limitation Act 1980.*

[9] ...

[10] Having considered the above cases in our view *the learned High Court judge had fallen into error in his judgment to have found that the cause of action in this case may have accrued not on the date of the surgery itself but could be the date the damage was discovered.* Since the legal position on the application of limitation is clear we find no reason for this claim to proceed to a full trial. (Emphasis added.)

[40] In the present case, based on the plaintiffs' pleaded case, it was the duty of the defendants as the solicitors for the plaintiffs to conduct a land search on the said property and to ensure that the column of bank/financier in the SPA was filled in and the defendants failed to do so.

[41] Therefore, we are of the considered opinion that the alleged negligence of the defendants would have occurred when the plaintiffs executed the SPA on either 6 April 2004 or 22 April 2004 as at that particular point of time, the column of bank/financier was left blank by the defendants and thus the defendants were in breach of their duty as the solicitors for the plaintiffs. The period of limitation in the present case can be said to have begun to run only from the first clear and unequivocal threat to the plaintiffs' right to purchase the said property, free from all liens and encumbrances, arising from the defendants' breach of their duty of care, to conduct a land search on the said property and to ensure that the column of bank/financier in the SPA was filled in.

[42] Thus, the plaintiffs would have suffered damage, the moment the SPA was executed as the plaintiffs would have contracted to purchase a property which is encumbered with a charge and which charge is not reflected in the SPA, thereby placing the plaintiffs in a position of detriment. Hence, the plaintiffs' cause of action in the present case arose on the date when the plaintiffs executed the SPA which is either on 6 April 2004 or 22 April 2004.

[43] Since the plaintiffs' cause of action for the tort of professional negligence against the defendants arose on either 6 April 2004 or 22 April 2004, the plaintiffs must bring a claim on tort against the defendants, before the year 2010 which is within six years from the date of cause of action. However, in the present case, the plaintiffs had only filed this suit in 2015 which is 11 years from the date when the cause of action accrued.

[44] We also find that even if the plaintiffs' cause of action for tort does not arise on the date when the plaintiffs executed the SPA, the cause of action for the tort of professional negligence would have accrued on the date when the plaintiffs paid the full purchase price for the said property, which is on 26 May 2004 as the plaintiffs would have suffered damage by virtue of being owners of a property which is encumbered with a charge, thereby placing the plaintiffs in a position of detriment.

[45] Either way, we are of the considered opinion that the plaintiffs' claim under tort is time barred as the suit was only filed on 28 July 2015.

[46] We noted that the plaintiffs did not plead and rely upon s 29 of the Limitation Act 1953, which allows for a postponement of the limitation period until the discovery of the cause of action. However, it is only applicable in respect of cases where the cause of action is based upon fraud or a mistake or is concealed by fraud. Clearly, s 29 of the Limitation Act 1953 was not applicable here as fraud or mistake was not even pleaded by the plaintiffs and the parties were bound by their pleadings.

CONCLUSION

[47] Premised on the reasons enumerated above, we find that there are merits in the appeal. The appeal is hereby allowed with cost and the decision of the High Court dated 13 August 2019 is set aside.

Appeal allowed with costs.

Reported by Nuzul Fitrie